

DECISION
TALBOT COUNTY BOARD OF APPEALS
Appeal No. 20-1715

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals via teleconference pursuant to Board of Appeals Resolution 20-01, passed on June 1, 2020, beginning at 6:30 p.m. on November 30, 2020 and continued to December 7, 2020, on the application of **DANIEL SIMPKINS** and **IRENE SIMPKINS** (the “Applicants”). The Applicants are requesting approval of one Non-Critical Area variance for the purpose of constructing a 24-foot by 15-foot, six-inch “L”-shaped storage shed within the 25-foot side-yard setback, located three feet from the property line; and one Critical Area variance to increase the approved lot coverage amount by 323 square feet, exceeding the 15 percent lot coverage limitation, for the addition of the storage shed, resulting in a total proposed lot coverage of 37,097 square feet.

The subject property (the “Property”) is an approximately 4.642 acre residential parcel, including approximately 4.403 acres within the Critical Area, owned by the Applicants and located at 26232 Heronwood Road, Easton, Maryland. The Property is improved by a two-story, single-family dwelling built around 2000, in-ground pool, an illegal nonconforming shed, hardscaped areas including multiple walkways and patios, a gravel driveway and a paved driveway that is the 34-foot wide, shared private road known as Heronwood Road. The Property is located in the Critical Area and includes a 50-foot front-yard setback, a 25-foot side-yard setback, and a 100-foot mean high-water setback (the Shoreline Development Buffer). The Property is shown on Tax Map 41, Grid 20 as Parcel 273, Lot 1, and its zoning classification is Resource Conservation (“RC”), Western Rural Conservation (“WRC”), within the Critical Area Overlay District (“CAO”). It is bound to the north, southwest and southeast by portions of

residential properties; to the west by Plaindealing Creek; to the east by a portion of the private road known as Heronwood Road and Hopkins Neck Road, a county road.

Applicants received a Request for Planning Officer Determination (R-19-025) on April 25, 2019 for a nonconforming status determination and a decision regarding the portion of the Property containing the 34-foot wide shared private road known as Heronwood Road. In accordance with the determination letter and a subdivision plat (MAS liber 64, folio 35, in the Land Records for Talbot County, Maryland) from 1984, the private road is part of Lot 1 and shall be included in the lot coverage calculation. The determination letter approves 36,774 square feet of legal nonconforming lot coverage in the RC zone. The unpermitted 237 square-foot shed is excluded from this approved amount and cannot count toward lot coverage allowance. The Applicants did not receive an abatement letter from the Code Enforcement division.

Applicants' request is made in accordance with Chapter 58 Enforcement of Code, § 58.10-1, 58.10-2; Chapter 190 Zoning, Article VII §190-58.3, §190-58.4; Article III, §190-15; Article II, §190-8.3 and §190-8.5 of the Talbot County Code (the "Code"). Relevant Critical Area provisions are included in Title 8, Subtitle 18 of the Natural Resources Article of the *Maryland Annotated Code* (the "Critical Area Program") and COMAR Title 27.

All participants in the meeting participated remotely by teleconference pursuant to the Fourth Amended Emergency Declaration of the County Council of Talbot County, adopted May 26, 2020 (the "Emergency Declaration"), declaring a state of emergency in Talbot County expiring at midnight on June 30, 2020, recognizing the continued threat posed by COVID-19 and allowing for county board and commission meetings to include an option for participants and the public to "participate by teleconference, live streaming, or other available technology . . ."; and

pursuant to Board of Appeals Resolution 20-01, passed on June 1, 2020, implementing a policy to coordinate the Talbot County Board of Appeals Rules of Procedure (the “Rules”) with the Emergency Declaration by defining the term “convene” in Rule 4 of the Rules to include Board members who choose to participate remotely by any of the methods set forth in the Emergency Declaration.

Present by teleconference at the hearing were Board of Appeals members Phillip Jones, Chairman; Frank Cavanaugh, Vice Chairman; Louis Dorsey, Paul Shortall and Zakary Krebeck. The Applicants attended the hearing with counsel, Bruce Armistead, Esq. of Armistead, Lee, Rust & Wright, P.A., 114 Bay Street Building C, Easton MD 21601. Present on behalf of the Critical Area Commission were Kate Charbonneau, Executive Director; Emily Vaineri, Assistant Attorney General; and Nick Kelly, Regional Program Chief. Miguel Salinas, Planning Officer, attended the hearing on behalf of Talbot County. William C. Chapman was the attorney for the Board of Appeals (the “Board”). It was noted for the record that each member of the Board had individually visited the site.

The following exhibits were offered and admitted into evidence as Board’s Exhibits as indicated:

1. Application for a Critical Area Variance and a Non-Critical Area Variance with Applicants’ narrative as Attachment A.
2. Tax Map with subject property highlighted.
3. Notice of Public Hearing for advertising in *The Star Democrat* newspaper.
4. Newspaper Confirmation.
5. Notice of Public Hearing and Adjacent Property Owner List.
6. Standards for Critical Area Variance with Applicants’ responses as Attachment B.

7. Standards for Non-Critical Area Variance with Applicants' responses as Attachment C.
8. Staff Report prepared by Maria Brophy, Planner II.
9. Sign Maintenance Agreement/Sign Affidavit.
10. Comments from Critical Area Commission.
11. Authorization letter from Applicants.
12. Disclosure and Acknowledgment Form.
13. Aerial Photos.
14. Public Works Agreement, PWA18-105.
15. Declaration of Covenants, Liber 594, Page 685.
16. Letter from Mary Kay Verdery dated April 25, 2020.
17. Letter from Richard G. Vicens, Jr. dated September 16, 2020.
18. Floor Plan and Elevation Plan (P1 through P3).
19. Site Plan dated September 22, 2020.
20. Notice of Zoning Violation, Abatement Order and Assessment of Civil Penalty from Michael Duell, Chief Compliance Officer, dated December 1, 2020.
21. Revised Staff Report prepared by Maria Brophy, Planner II.
22. Acknowledgement by Daniel S. Simpkins and Irene F. Simpkins of Violation and Civil Penalty, waiving right to contest or appeal civil penalty amount, dated December 7, 2020.
23. Email from Bruce Armistead to Mike Duell, Chief Compliance Officer, with memorandum dated December 7, 2020 including receipt of payment of Civil Penalty.

The following exhibits were offered and admitted into evidence as Applicants’

Supplemental Exhibits as indicated:

1. Maryland Natural Resources Article, Section 8-1808 (highlighted).
2. Lane Engineering email re: shed square footage figures, dated November 25, 2020.
3. Photos (2) depicting areas prone to flooding in rear yard.
4. Planning Officer Response #R-19-025 to Request filed by Christine Dayton regarding legal nonconforming impervious surface coverage.
5. Planning Officer Response #R-20-024 to Request filed by Bruce Armistead regarding underground storage tank location within side yard setback.

Mr. Armistead appeared on behalf of the Applicants. Mr. Armistead addressed the Commission’s position that an applicant in violation of a Critical Area provision must be cited and have paid a fine in order to proceed with an after the fact variance request. This is not feasible, Mr. Armistead said. Pursuant to §8-1808(c)(iii)(14) of the Critical Area Program, he said, each person “who committed or participated in” a violation of the subsection is subject to a fine. The Applicants, he said, fit neither of these categories; they played no role in creating the violation nor in assisting it.

As a matter of policy, Mr. Armistead said, it is inappropriate for the county or the Commission to subject the Applicants to a penalty when the Applicants are trying to remedy a violation they did not create. There are many similar situations around the county, he added, and such a practice could discourage owners from coming forward and attempting to cure violations out of fear of being cited and fined.

Ms. Vaineri, assistant Attorney General for the Commission, responded. First, Ms. Vaineri said that §8-1808(c)(iii)(14) of the Critical Area Program refers to specific penalty provisions that must be in each county's program itself. Regarding the policy concerns Mr. Armistead raised, Ms. Vaineri stated the law is very clear that violations must be cured before changes are made to a property. The county must cite all Critical Area violations, she said, regardless of whether such violations were intentional or unintentional, by the current owner or a previous owner; the law does not treat those circumstances differently.

Ms. Vaineri outlined Code and COMAR provisions that govern applications for any variance related to a Critical Area violation, and said the Staff Report is clear that the shed on the Property is an unreported shed for which citations have not been issued. Under Chapter 58-10.2 of the Code, she said, the county cannot accept an application for a variance until a violation is assessed and a penalty is paid. Ms. Vaineri said that, although the county had accepted this application in spite of the Applicants' not being assessed a violation or penalty, and curing the same, it is premature for the Board to hear the matter and issue a variance until a citation was issued and penalty assessed and satisfied.

Mr. Krebeck asked why the need to cite an applicant existed when the purpose of the variance request was to eliminate the violation. Mr. Jones said the shed on the Property is the type that is often prefabricated and has been on the Property for a long time. In the early 2000s, Mr. Jones said, site plans often did not illustrate all lot coverage or accessory structures. Lot coverage calculations and enforcement of violations were more casual, Mr. Jones said, when the shed was placed on the Property. Since 2010, he said, the laws relating to both are stricter: "We're retroactively applying much stricter rules [regarding] expectations of homeowners than when the violation occurred."

Ms. Vaineri said that, unlike a scenario wherein the county, in its discretion, did not enforce a nonconforming shed the Applicants chose to leave in place, here Applicants were relying on the presence of the nonconforming shed as justification for a new replacement and additional lot coverage.

Mr. Armistead said he did not agree that the Applicants were relying on the existence of the nonconforming shed, and said the additional area is only 86 square feet of impervious coverage above what is currently assessed to the Property. The current shed is partially on neighboring property; the Applicants, he said, are trying to legitimize the entire 323 square feet of shed.

Mr. Dorsey asked whether the county would cite a previous owner who created the violation, or whether the current Applicants, who purchased the Property with the shed already in place, would have to pay a fine to cover a prior owner's act. Ms. Vaineri said the county has the discretion to assess, and then waive, a fine, with a condition that an owner obtain an after-the-fact variance, but that the process must be adhered to.

Mr. Armistead asked if the Commission would consent to having the hearing proceed, even if the Board could not make a decision until a penalty was assessed against the Property. The Board voted unanimously to enter a closed session to confer with counsel.

Upon resuming the regular session, the Board proposed that it would hear testimony during this session, but defer making a decision until county staff could assess a penalty, and the Applicants could resolve the same, potentially by the following Monday. Mr. Salinas said a proposed restoration/mitigation plan would also be required.

Ms. Vaineri said the Commission consented to the proposal on the condition that the Applicants waive their right to appeal the Critical Areas violation. The Applicants agreed.

Applicants purchased the Property in 2005 after asking their realtor to find them a property of “at least four acres.” What the Applicants did not realize at that time, Mr. Armistead said, was that a substantial portion of the lot – over 1.6 acres – was the shared private road known as Heronwood Road, leaving just over three acres as the actual, usable lot area exclusive to the Applicants.

Private roads are treated differently by the county and developers, Mr. Armistead said – sometimes created as a separate parcel, owned jointly by uses as tenants in common; other times divided into segments, with a portion deeded to each individual lot. The fact that the private road here is included within one lot – the subject Property – is the basis of the Applicants’ problem, he said, because all impervious coverage created by the private road alone causes the Property to exceed its 15 percent threshold.

When the Applicants bought the Property, it was already approved with a residence, shed, pool – “everything that exists today that creates coverage,” Mr. Armistead said, adding that the Applicants were told that the shed was in full compliance with all applicable regulations. The shed, however, was not shown on any plats. Mr. Armistead said that the shed is “much more than just a utility shed,” and said that several years ago, during planning work for renovations, the Applicants’ architect discovered that the shed encroached both on the setback and a property line. In 2019, when the architect sought a certificate of occupancy, the county planning officer revealed the nonconforming status of the shed. Without curing the encroachment, he said, the Applicants cannot bring the residence and Property into compliance and obtain a final certificate of occupancy.

Only 86 square feet under the Applicants’ proposal is new coverage over what exists in the Critical Area today, Mr. Armistead said. “If we could somehow lop off the [private] road,” he

said, “we could be in compliance,” subject to setbacks. Efforts the Applicants have made to try to bring the Property into compliance, Mr. Armistead said, include more than one unsuccessful attempt to purchase land from a neighboring property owner via a lot line revision; acquiring wildlife areas on the plat to increase acreage and keeping the replacement shed under 300 square feet, which could not be done due to site constraints.

Members of the Board asked questions about areas highlighted by the architect on the site plan as potential areas to remove impervious lot coverage. Mr. Armistead confirmed that these illustrations were not included in the current lot coverage calculations. Mr. Simpkins said the areas illustrated in the driveway portion of the Property were not feasible for removal because of the need to back out of the driveway, as well as the need to maintain a covered area to store garbage cans for pickup by a waste management service.

Mr. Jones said long wheel-base trucks typically used by area contractors could likely not turn around effectively without the driveway portions in question. Emergency vehicle access would be another consideration, he said.

Mr. Simpkins described why other areas of the Property were unfeasible or impractical to relocate the shed, including areas that require free space for access like a wellhead next to the swimming pool and other portions that are significantly flooded after a rain event, as depicted on photos submitted with the application. Mr. Simpkins said the Applicants want the opportunity to have a shed that is common in the county for general use but to do so in an environmentally sensitive manner that does not require removing trees.

Mr. Armistead said the conditions on the Property were not caused by the Applicants and that a literal interpretation of the Critical Area portion of the Code will not allow them to enjoy the Property. The requested variances, he said, will not affect water quality, and all but 86 square

feet of impervious coverage already exist on the Property. The Applicants will replace the modest shed without disturbing trees and vegetation, he said, and have made efforts to minimize the scale of the shed. Mr. Armistead said the Property is of an unusual size and shape, that the conditions on the Property were not created by the Applicants, and that the Applicants do not seek greater profitability in seeking approval of the variance requests. Mr. Armistead said approval of the variance requests is not contrary to the public interest, and that only one adjacent parcel would be affected, the owner of which consents to approval of the variances. The requested variances are the minimum relief necessary to replicate a functional shed, he said. Regarding the setback variance, he said the existing shed is not only located within the setback, but also encroaches over a property line; granting the variance request would allow the Applicants to improve that situation.

The Board asked questions about whether or not, by removing the covered porch area of the shed, it could qualify for a reduced setback, reducing the coverage from 323 square feet to 281. Mr. Simpkins said the covered porch area is necessary to keep garbage cans out of the elements. In response to a question about unwarranted hardship should the Board deny the variance requests, Mr. Armistead pointed out portions of the Property that frequently flood, drainage swales and the shape of the Property and said that there is nowhere else appropriate to locate the shed. He clarified that other property owners who utilize the Heronwood Road have a deeded right of way over the private road portion of the Property, further limiting the Applicants' options.

Dr. Kelly testified on behalf of the Commission in opposition to the application. He said that state law defines "unwarranted hardship" such that, without the granting of a variance, property owners would be denied reasonable use of the entire parcel or lot. Applicants have

reasonable, significant use of the Property, which contains walkways, a pool, a driveway and other features, Dr. Kelly said. While recognizing the constraints the private road places by adding additional lot coverage only to the Property despite being utilized by other property owners, Dr. Kelly said the existence of so many structures and uses on the Property and the potential to locate a shed on existing lot coverage is evidence no hardship exists.

Dr. Kelly said a literal interpretation of the ordinance will not deprive the property owner of rights commonly enjoyed by other property owners in the same zone. Commission staff have reviewed similar conditions in variance requests for other applicants, he said, adding that in his opinion, Applicants could find places to reduce impervious coverage instead. The Property has over 4,500 square feet of sidewalk, pads, patio and pool, he said: “there should be some wiggle room somewhere.”

Dr. Kelly said the Applicants did not overcome the presumption that the granting of the variances would adversely affect water quality or adversely impact fish, wildlife or plant habitat, and requested the Board deny the Applicants’ requests.

Mr. Armistead said the Commission sought to penalize Applicants for prior owners’ acts, that the Applicants do have a hardship in not being able to use the entirety of the Property and that they do not have practicable options to remedy their situation other than seeking the variance requests. He noted that the Staff Report commented that sheds of this type are a common, even essential, amenity enjoyed by similarly situated owners. If the Applicants were to exclude the private road from the Property and view it as a three-acre parcel, he said, the Applicants would fall within the 15 percent coverage threshold. Regarding water quality and impacts on wildlife and flora, Mr. Armistead said the Applicants “don’t want to see the Bay die a death by 1,000

cuts,” but that in this case, the alternatives to replacing the shed are more deleterious than what is proposed.

The Board unanimously approved a motion to continue the hearing until the following Monday, also remotely by teleconference. At 6:30 p.m. on December 7, 2020, beginning at 6:30 p.m., the hearing resumed. During the intervening week, the county assessed a Notice of Violation and Abatement Order, and a Civil Penalty in the amount of \$100.00, the acknowledgement of which and payment of which, respectively, were provided as further Board exhibits. The Board discussed the factors for both the Critical Area and Non-Critical Area variances. Mr. Jones said that the Commission’s suggestion at first seemed reasonable that, within 4,500 square feet of hardscape, the Applicants should be able to find 300 square feet to eliminate to offset the shed. However, a site visit to the Property illuminated the hardship and how the existing hardscape channels the movement of people throughout the Property, as well as important vehicle access and turnaround capabilities of the existing driveway, in a way that it is impractical to remove in a piecemeal fashion.

The Board made the following findings of fact and law:

1. All legal requirements pertaining to a public meeting were met.
2. Special conditions or circumstances exist that are peculiar to the land or structure such that a literal enforcement of the provisions of this chapter would result in unwarranted hardship. Per the application and site plan, approximately 1.698 acres of the 4.642-acre parcel lies within a shared private road referred to as Heronwood Road, thereby resulting in approximately 2.944 acres of remaining usable land (before taking into account the 15 percent lot coverage limitation and all required setbacks). As specified in the application and site plan, the Property is

further restricted by the 200-foot minimum lot width setback, 25-foot side-yard setback, 100-foot Shoreline Development Buffer, Sewage Disposal Area and associated 20-foot buffer, multiple trees and hardscaped areas. The allocation of the impervious coverage of Heronwood Road solely to the Property, despite being used to access neighboring properties, creates a difficult circumstance for Applicants. The subdivision creating the Property, the shape of the Property with a long “tail” and the private road alignment and impervious surface allocation predate Critical Area laws; as a result, Critical Area laws and how they affect the Property is different than how Critical Area laws affect other properties within the same subdivision.

3. A literal interpretation of the Critical Area requirements will deprive the property owner of rights commonly enjoyed by other property owners in the same zoning district. As stated by the Applicants, residential storage sheds are a common amenity in Talbot County. The Applicants currently use the unpermitted shed for the storage of lawn and pool equipment and supplies, and wish to maintain this use with the replacement shed. The proposed shed is relatively modest in size and is consistent with other residential accessory sheds in Talbot County.
4. The granting of a variance will not confer upon the property owner any special privilege that would be denied by this chapter to other owners of lands or structures within the same zoning district. Most properties in the County, especially in the Applicants’ zoning district, accommodate similar sheds to the Applicants’ proposed replacement shed.

5. The variance request is not based on conditions or circumstances which are the result of actions by the Applicants, including the commencement of development activity before an application for a variance has been filed, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property. The parcel was created in 1984, prior to the enactment of Critical Area regulations, by Plat MAS 64/35, which included the shared private road. The Applicants purchased the Property in 2005 in its current configuration. At that time, the Applicants were unaware of the existing shed's illegal status or encroachment onto the neighboring property. The granting of this variance will allow the Applicants to eliminate the encroachment, as requested by the neighboring property owner, and bring the Property into good standing with Talbot County. As further identified in finding number 8 herein, Applicants made multiple good-faith efforts to remedy the illegal status and encroachment issues by attempting to purchase neighboring property, but these attempts were unsuccessful.
6. The granting of the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat, and the granting of the variance will be in harmony with the general spirit and intent of the state Critical Area Program.
7. The variance shall not exceed the minimum adjustment necessary to relieve the unwarranted hardship. Per the Applicants, the size of the proposed shed was intentionally minimized to accomplish the minimum adjustment necessary and to approximate the size of the existing shed. The proposed shed is relatively modest in size and appropriate for its intended use.

8. If the need for a variance to a Critical Area provision is due partially or entirely because the lot is a legal nonconforming lot that does not meet current area, width or location standards, the variance should not be granted if the nonconformity could be reduced or eliminated by combining the lot, in whole or in part, with an adjoining lot in common ownership. The Property is not in common ownership with the adjoining property. Per the Applicants, there have been multiple good-faith attempts to resolve the encroachment and lot coverage nonconformity by acquiring a portion of the adjoining property through a lot line revision; however, these attempts have been unsuccessful.
9. Unique physical characteristics exist, such as unusual size or shape of the property or extraordinary topographical conditions, such that the literal enforcement of the provisions of this chapter would result in a practical difficulty or unreasonable hardship in enabling the applicant to develop or use this property. As identified in the findings for Critical Area variance standards, number 2. herein, the Property contains a number of unique physical characteristics, including the nonconforming lot width, Sewage Disposal Area location, and a substantial amount of lot coverage, which includes the shared private road.
10. The need for the variance is not based upon circumstances which are self-created or self-imposed. The Applicants purchased the Property in its current condition and were unaware of the existing shed's illegal status or encroachment onto the neighboring property. The remaining existing lot coverage, including the private road and excluding the unpermitted shed, was deemed legal nonconforming by Planning Officer Determination R-19-025.

11. Greater profitability or lack of knowledge of the restrictions shall not be considered as sufficient cause for a variance. The purpose of the variance is to eliminate the property line encroachment, as requested by the neighboring property owner, and bring the Property into good standing with Talbot County. Greater profitability or lack of knowledge of current restrictions are not motives for the request.
12. The variance will not be contrary to the public interest and will not be a detriment to adjacent or neighboring properties. Replacement of the existing shed will eliminate encroachment onto the neighboring property while still providing adequate storage space for the Applicants' equipment. The owner of the only property affected by the encroachment did not object to the Applicants' proposal to replace the shed in a way that eliminates the encroachment. The replacement shed will most likely not be visible from that neighbor's residence. Furthermore, neighboring property owners, unlike the Applicants, are not burdened by the lot coverage limitations imposed on the Applicants by the long right-of-way private road.
13. The variance shall not exceed the minimum adjustment necessary to relieve the practical difficulty or unreasonable hardship. As stated in the findings for Critical Area variance, number 7 herein, the Property contains a number of unique physical characteristics, including the nonconforming lot width, Sewage Disposal Area location, and substantial amount of lot coverage, which includes the shared private road.

HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY
THE TALBOT COUNTY BOARD OF APPEALS,

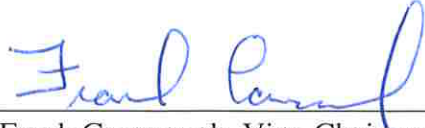
RESOLVED, that the Applicants, **DANIEL SIMPKINS** and **IRENE SIMPKINS**
(Appeal No. 20-1715) are **GRANTED** the requested variances consistent with the evidence
presented to the Board of Appeals, subject to the following conditions:


1. Applicants shall address any outstanding issues or comments prior to submittal of the building permit application.
2. Applicants shall make applications to the Office of Permits and Inspections, and follow all of the rules, procedures and construction timelines as outlined regarding new construction.
3. Prior to issuance of the building permit, Applicants shall submit a site plan with a signature block signed by the property owners and a note showing the existing shed to be removed and the restoration plan as proposed.
4. Applicants shall provide a Buffer Management Plan showing 3:1 mitigation for the disturbance related to the new lot coverage.
5. Applicants shall commence construction on the proposed improvements within eighteen (18) months from the date of the Board of Appeals' approval.

GIVEN OVER OUR HANDS, this 10th day of March, 2021.

TALBOT COUNTY BOARD OF APPEALS


Phillip Jones, Chairman


Frank Cavanaugh, Vice-Chairman


Louis Dorsey, Member


Paul Shortall, Member


Zakary Krebeck, Member